No. 17-494

In the Supreme Court of the United States

SOUTH DAKOTA, PETITIONER

v.

WAYFAIR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

South Dakota requires certain businesses that do not have a "physical presence in the state" to collect sales taxes on the goods and services they sell to South Dakota customers and to remit those taxes to the State. S.D. Codified Laws § 10-64-2 (Supp. 2017). The question presented is whether that requirement violates the dormant Commerce Clause.

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INTEREST OF THE UNITED STATES

This case concerns the application of the dormant Commerce Clause to a state tax-collection requirement. The United States has a substantial interest in the Court's resolution of the question presented because the rules that govern in this area will significantly affect the functioning of the national economy and the States' financial stability. The United States has participated in past cases concerning the application of the dormant Commerce Clause to state tax laws. See *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787 (2015); *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005).

STATEMENT

1. The Commerce Clause empowers Congress to "regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, Cl. 3. Although "the Clause is framed as a positive grant of power to Congress," this

Court has construed it "to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation and internal quotation marks omitted). The dormant Commerce Clause prohibits state taxation or regulation "that discriminates against or unduly burdens interstate commerce." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997) (citations omitted).

2. In a series of cases from the 1940s and 1950s, this Court held that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). The Court relied on that principle to broadly preclude the States "from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States," including by "imposing a direct tax on interstate sales," whether or not intrastate commerce was subject to the same restrictions. *Id.* at 252, 256; see *Spector Motor Serv., Inc.* v. *O'Connor*, 340 U.S. 602, 609-610 (1951) (forbidding States from levying "taxes upon the privilege of carrying on a business that was exclusively interstate in character") (emphasis omitted).

In *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967) (*Bellas Hess*), the Court held that a mail-order retailer who shipped catalogs and goods into Illinois could not be required to collect Illinois taxes on transactions with state residents because the retailer lacked the "minimum connection" to the State required by the dormant Commerce Clause as well as the Due Process Clause. *Id.* at 756, 758 (citation omitted). The Court adhered to "the sharp distinction

which [its prior] decisions ha[d] drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758. Echoing the reasoning of *Freeman* and *Spector Motor Service*, the Court characterized mail-order transactions between in-state consumers and out-of-state sellers as "exclusively interstate in character," *id.* at 759, and concluded that "this is a domain where Congress alone has the power of regulation and control," *id.* at 760.

In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (*Complete Auto*), this Court overruled *Freeman* and *Spector Motor Service*. *Complete Auto* involved a dormant Commerce Clause challenge to the application of Mississippi's sales tax to the transportation of automobiles shipped to Mississippi from other States. *Id.* at 275-276. In upholding the application of the tax, the Court abandoned its earlier rule "that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278. The Court observed that "[i]t was not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Id.* at 288 (citations omitted). The Court concluded that the constitutionality of state taxes on interstate commercial activities or transactions should be evaluated in light of "economic realities" and the "practical effect of the tax," rather than on the basis of formalistic distinctions between interstate and intrastate commerce. *Id.* at 278-279. To guide that inquiry, the Court adopted a four-factor test, under which a state tax should be "sustained * * * against Commerce Clause challenge when the tax

is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

In *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992) (*Quill*), this Court considered whether *Bellas Hess* should be overruled in light of *Complete Auto* and other intervening decisions. Like *Bellas Hess*, *Quill* presented the question whether an out-of-state retailer that delivered goods by mail or common carrier to customers located within the taxing State could constitutionally be required to collect and pay state taxes on those transactions. See *id.* at 302-303. The Court in *Quill* overruled *Bellas Hess*'s due-process holding. The Court explained that a mail-order business that "purposefully direct[s] its activities" at residents of a State by engaging in "continuous and widespread solicitation of business" there has a connection to the State that is sufficient for due-process purposes, "irrespective of [the business's] lack of physical presence" in the State. *Id.* at 308. The Court held, however, that the same connection was insufficient under the dormant Commerce Clause, and it reaffirmed the *Bellas Hess* "safe harbor" for businesses "whose only connection with customers in the taxing State is by common carrier or the United States mail." *Id.* at 315 (brackets and citation omitted).

In reaching that result, the *Quill* Court rejected the State's contention that *Bellas Hess*'s Commerce Clause analysis had been supplanted by *Complete Auto*. *Quill*, 504 U.S. at 313-315. Instead, the Court concluded that *Bellas Hess* was best understood to "stand[] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required" by *Complete Auto*. *Id.* at

311. The Court acknowledged that this "bright-line rule"—which the Court described as a "physical-presence requirement," *id.* at 314, 317—was "artificial at its edges," treating mail-order businesses differently based on whether they maintained "a small sales force, plant, or office" in the taxing State. *Id.* at 315. The Court determined, however, that the *Bellas Hess* rule should be retained in light of its value to the mail-order industry and principles of stare decisis. *Id.* at 315-317.

3. Like many States, South Dakota imposes a tax on the sale of goods and services to "consumers or users" in the State. S.D. Codified Laws § 10-45-2 (Supp. 2017); see *id.* § 10-45-4 (2010). Sellers are generally responsible for collecting the tax from the consumer at the time of sale and then remitting the proceeds to the State. *Id.* § 10-45-27.3 (Supp. 2017). If a seller fails to collect the tax at the time of sale, however, the consumer is responsible for remitting the tax. *Id.* § 10-46-2 (Supp. 2017); see *id.* § 10-46-4 (2010).

In 2016, the South Dakota legislature enacted Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." 2016 S.D. Sess. Laws 217-220. As its title suggests, Senate Bill 106 is an effort to address the State's "inability to effectively collect" generally applicable sales taxes "from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota." S.D. Codified Laws § 10-64-1(1) (Supp. 2017). According to the statute's legislative findings, the obstacles to collecting those taxes have "seriously erod[ed] the sales tax base of th[e] state" and have "caus[ed] revenue losses and imminent harm * * * through the loss of critical funding for state

and local services." *Ibid.* The statute contains an additional finding that the State's inability to collect sales and use taxes from remote sellers is "especially serious * * * because the state has no income tax, and sales and use tax revenues are essential in funding state and local services." *Id.* § 10-64-1(2) (Supp. 2017).

Senate Bill 106 requires any business that "does not have a physical presence" in South Dakota to collect taxes on the sales of goods or services into the State "as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64-2 (Supp. 2017). The statute exempts businesses that made fewer than 200 taxable transactions and received less than $100,000 in gross revenue in South Dakota in the preceding year. *Ibid.* It also provides that collection-and-remittance requirements cannot be imposed retroactively. *Id.* § 10-64-6 (Supp. 2017).

In enacting Senate Bill 106, the South Dakota legislature recognized that the "law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question." S.D. Codified Laws § 10-64-1(10) (Supp. 2017). Senate Bill 106 provides that, if the statute is challenged in court, it should "be appropriately stayed * * * until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine." *Ibid.*

4. South Dakota filed this action in state court seeking a declaration that Senate Bill 106 is valid and applicable to respondents, each of whom operates an online retail business. Pet. App. 9a-10a. Respondents moved for summary judgment on the ground that, under *Quill*,

they cannot be compelled to collect and remit South Dakota sales taxes because they lack a physical presence in South Dakota. *Id.* at 16a. In its summary-judgment response, South Dakota agreed with respondents that the State cannot enforce Senate Bill 106 unless this Court overrules *Quill*. *Ibid.* Based on that concession, the trial court granted summary judgment to respondents. *Id.* at 15a-18a.

The Supreme Court of South Dakota affirmed. Pet. App. 1a-14a. Based on the "undisputed facts and the Supreme Court's holdings in *Bellas Hess* and *Quill*," the court concluded that "Senate Bill 106 could not impose a valid obligation on [respondents] to collect and remit sales tax to this State because none of them had a physical presence in the state." *Id.* at 12a.

SUMMARY OF ARGUMENT

In light of Internet retailers' pervasive and continuous virtual presence in the States where their websites are accessible, the States have ample authority to require those retailers to collect state sales taxes owed by their customers. *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), should not be read to bar that result, both because the *Quill* Court did not and could not anticipate the development of modern e-commerce, and because *Quill*'s analysis was deeply flawed.

A. *Quill* reaffirmed the rule of *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), that the dormant Commerce Clause precludes a State from requiring an out-of-state mail-order retailer that communicates with its customers solely by mail or common carrier to collect state sales taxes on the purchase of goods by state residents. That bright-line rule, which lacks support in the Court's broader dormant Commerce Clause jurisprudence, is misconceived.

The Court in *Quill* misapplied *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which establishes a four-factor test for determining the validity of a state tax. *Quill* concluded that state-tax-collection requirements of the sort at issue here fail the first prong of that test because a mail-order retailer lacks a "substantial nexus" to the States in which it does business. That determination was flawed in its inception: the *Complete Auto* test addresses only the validity of a state tax, not the distinct question of who may be required to *collect* the tax. States indisputably may tax sales to state residents by out-of-state retailers. Laws of the sort at issue here, involving nondiscriminatory tax-collection requirements that impose only incidental burdens on commerce, are more appropriately analyzed under the general balancing framework set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

South Dakota Senate Bill 106 and similar laws are constitutional under that framework. Such laws confer significant benefits on States, including by ensuring the effective collection of revenue and avoiding market distortions that privilege out-of-state businesses over in-state ones. Those benefits are not clearly outweighed by any incidental burdens imposed on interstate commerce by enforcement of a uniform tax-collection obligation.

B. In light of the serious analytical flaws underlying the decision in *Quill*, this Court should limit that case to its precise holding, involving traditional mail-order retailers whose only connection to a State is by mail or common carrier. Although the courts below and the parties here construe *Quill* and *Bellas Hess* to impose a broader "physical-presence" requirement, neither case compels such a reading. Rather, those cases are more appropriately understood to be artifacts of their time,

reflecting economic conditions under which retailers who lacked a physical presence in a State were effectively constrained to communicate with customers by mail or common carrier. Neither decision could have foreseen the rise of modern e-commerce, through which Internet retailers can establish a pervasive and continuous presence—including by maintaining virtual storefronts that seek to replicate the experience of shopping in a physical store, available to every state resident 24 hours a day—even in States where they have no employees or physical property. This Court need not overrule *Quill* and *Bellas Hess*, but it should decline to extend them to the distinguishable context of e-commerce.

C. If the Court construes *Quill* and *Bellas Hess* to impose a physical-presence requirement that extends to Internet retailers, those decisions should be overruled. A physical-presence requirement lacks support in this Court's broader dormant Commerce Clause jurisprudence, bears no logical relationship to current economic conditions, and imposes intolerable burdens on the States' ability to collect tax revenue they are lawfully owed. Principles of stare decisis do not compel a contrary result. *Quill* is badly reasoned and has proved unworkable in the age of modern e-commerce. The nature of an Internet retailer's presence in the States where its website is accessible is different in kind from any type of "presence" that the Court could have anticipated when *Quill* and *Bellas Hess* were decided. And given the proliferation of such retailers, imposition of a physical-presence requirement would substantially impede state tax collection and would distort retailers' choices of appropriate business models.

D. As in other cases involving the dormant Commerce Clause, Congress may enact legislation that

overrides the default constitutional rules that govern state tax-collection requirements. But that is not a reason for this Court to decline to limit or overrule *Quill* and *Bellas Hess*. Congress's ability to regulate interstate commerce will be enhanced if this Court clarifies the appropriate default constitutional rule that will apply absent congressional intervention.

ARGUMENT

SOUTH DAKOTA SENATE BILL 106 AND SIMILAR STATE-TAX-COLLECTION REQUIREMENTS ARE PERMISSIBLE REGULATIONS OF INTERSTATE COMMERCE UNDER THE DORMANT COMMERCE CLAUSE

In *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), this Court held that an out-of-state retailer cannot be required to collect sales or use taxes owed by its customers if the retailer's "only connection with customers in the [taxing] State is by common carrier or the United States mail." *Quill*, 504 U.S. at 315 (quoting *Bellas Hess*, 386 U.S. at 758). Based on the *Quill* Court's references to that rule as a "physical-presence requirement," *id.* at 314, 317, the parties and the courts below read *Quill* to foreclose South Dakota from imposing state-tax-collection requirements on Internet retailers that operate commercial websites but have no employees or physical property located within the State. But respondents' pervasive and continuous virtual presence in South Dakota amply justifies the imposition of state-tax-collection requirements, and *Quill* need not and should not be understood to prevent that sensible result.

In our view, the *Quill* Court held only that an out-of-state retailer's delivery of catalogs and goods into the taxing State by mail or common carrier is not by itself

a sufficient ground for requiring the retailer to collect state taxes owed by its customers. *Quill*'s references to a "physical-presence requirement" are best understood not as a distinct holding of the Court, but simply as shorthand for the rule that deliveries by mail or common carrier are not enough. The Court that decided *Quill* did not and could not anticipate the development of Internet commerce, through which an out-of-state retailer can establish a continuous and pervasive presence in a State even though it has no employees or physical property located there.

The Court should resolve this case by making clear that an out-of-state Internet retailer's virtual presence within a State is a sufficient ground for requiring the retailer to collect sales or use taxes owed by its in-state customers. To establish that proposition, the Court need not disturb *Quill*'s holding that delivery of catalogs and goods by mail or common carrier is not by itself an adequate basis for imposing state-tax-collection duties. Alternatively, if the Court concludes that *Quill*'s binding precedential effect extends to Internet commerce, that decision should be overruled.

A. The "Safe Harbor" Rule Adopted In *Quill* And *Bellas Hess* Cannot Be Reconciled With This Court's Broader Dormant Commerce Clause Jurisprudence

The principal aim of this Court's modern dormant Commerce Clause jurisprudence is to prevent States from enacting protectionist measures that discriminate against or unjustifiably burden interstate commerce. *Department of Revenue* v. *Davis*, 553 U.S. 328, 337-338 (2008); see *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577-578 (1997) (explaining that dormant Commerce Clause principles protect the

integrity of the national economy by preventing "'economic Balkanization' * * * and the retaliatory acts of other States that may follow") (citation omitted). State tax laws may violate those principles if they tax interstate transactions more heavily than intrastate ones, grant a "direct commercial advantage" to in-state businesses that is not enjoyed by out-of-state competitors, or subject interstate transactions to "multiple taxation." *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation omitted); see *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005).

Senate Bill 106, which requires in-state and out-of-state retailers to collect valid taxes due on the sale of goods to customers within the State, does not offend those principles. That law does not treat interstate and intrastate commerce differently in any respect. It grants in-state businesses no special protection from out-of-state competition, and it imposes no burden on out-of-state businesses that is not shared by their in-state counterparts. Instead, the law ensures that all retailers, regardless of how they solicit sales and deliver goods to customers within South Dakota, comply with a uniform obligation to assist the State in the collection of taxes that are lawfully due. An evenhanded regulation of that sort does not violate the dormant Commerce Clause.

The "safe harbor" rule of *Quill* and *Bellas Hess*, which creates a categorical exception to state-tax-collection requirements for out-of-state retailers who engage in commerce solely by mail or common carrier, cannot be reconciled with this Court's broader Commerce Clause jurisprudence. The *Quill* Court described that rule as reflecting a determination that an out-of-state retailer's delivery of catalogs and goods

into a State by mail or common carrier is insufficient to establish a "substantial nexus" to that State under *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). See *Quill*, 504 U.S. at 311. But *Complete Auto*'s four-part test is used to determine whether a State *may tax* particular events or transactions, and it is undisputed that South Dakota may tax interstate sales of the sort at issue here. To the extent that requiring out-of-state retailers to *collect* those taxes raises distinct dormant Commerce Clause concerns, those issues are appropriately analyzed not under *Complete Auto*, but under the general balancing framework for incidental burdens on commerce set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Analyzed under that framework, the South Dakota tax-collection requirements at issue here are consistent with the dormant Commerce Clause.[1]

1. The Quill *Court's "substantial nexus" analysis reflected a misapplication of the* Complete Auto *framework*

Under *Complete Auto*, a state tax imposed on interstate commerce will be sustained as long as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate

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[1] In addition to the limitations imposed by the dormant Commerce Clause, the Due Process Clause places constraints on a State's power to burden interstate commerce, including the requirement that a "minimum connection" exist "between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 305-306 (quoting *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 (1954)). The Court in *Quill* made clear, however, that this requirement is satisfied when a mail-order retailer "is engaged in continuous and widespread solicitation of business within a State," notwithstanding its "lack of physical presence in the taxing State." *Id.* at 308.

against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. The Court in *Quill* stated that *Bellas Hess* is best understood to "concern[] the first" prong of the *Complete Auto* test, and to "stand[] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311. That analysis was misconceived.

The Court's opinion in *Quill* elided the distinction between the State's authority to *impose* its sales tax on in-state customers and its authority to require out-of-state retailers to *collect* the tax. The Court's recitation of the facts explained that the dispute between the parties concerned whether the State could compel the out-of-state retailer to collect a use tax from its in-state customers. See 504 U.S. at 302-303. Read literally, however, other language in the opinion suggests that the taxability of the relevant sales was at issue. *Id.* at 315 (characterizing the *Bellas Hess* "safe harbor" as "the demarcation of a discrete realm of commercial activity *that is free from interstate taxation*") (emphasis added); *id.* at 316 (asserting that the *Bellas Hess* rule created a "bright-line *exemption from state taxation*") (emphasis added).

The *Complete Auto* test addresses the circumstances in which the Court will "sustain[] *a tax* against Commerce Clause challenge." 430 U.S. at 279 (emphasis added); see *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 30 (1988) (explaining that *Complete Auto*'s "four-part formulation" is "used to evaluate the validity of state taxes vis-à-vis the Commerce Clause"); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 372

(1991) (same). The test's substantial-nexus requirement seeks to ensure that the "activity taxed" is "sufficiently connected to the State to justify a tax." *Complete Auto*, 430 U.S. at 287. The other prongs of the test likewise address features of state taxes themselves. See *ibid.* (explaining that the dormant Commerce Clause precludes a state "tax [that] is not fairly related to benefits provided the taxpayer, or that * * * discriminates against interstate commerce, or that * * * is not fairly apportioned").

The "activity" at issue in *Quill* was the delivery of goods to a customer in the taxing State and the concomitant transfer of title to the in-state customer. If that activity lacked the "substantial nexus" to the taxing State that *Complete Auto* requires, the logical consequence would be that a State could not tax it at all. But despite the language in *Quill* suggesting that taxability was at issue, and the Court's invocation of a four-part test that is used to determine the validity of state taxes, *Quill* does not appear to have spawned any meaningful uncertainty as to a State's power to require in-state customers to pay sales or use taxes on goods they receive by mail or common carrier from out-of-state retailers. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State" under the *Complete Auto* test and its predecessors. *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995); see, *e.g.*, *id.* at 200 (upholding State tax on sales of interstate bus tickets); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 48-50 (1940) (same for tax on sales of coal by out-of-state seller); *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 582-583 (1937) (same for tax on use of

goods purchased from out-of-state seller). That rule applies "even when the parties to a sales contract specifically contemplate[] interstate movement of the goods either immediately before, or after, the transfer of ownership." *Jefferson Lines*, 514 U.S. at 187.

When an in-state customer purchases goods from an out-of-state supplier who ships the goods to the customer in interstate commerce, the State is entitled to tax the transaction because the "sale" is "a local activity, delivery of goods within the State upon their purchase for consumption." *McGoldrick*, 309 U.S. at 58; see *Jefferson Lines*, 514 U.S. at 187. The transfer of ownership of purchased goods within a State "is 'nexus' aplenty" under the *Complete Auto* framework. *Jefferson Lines*, 514 U.S. at 184 (quoting *D. H. Holmes*, 486 U.S. at 33). See *Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1131-1132, 1143 (10th Cir. 2016) (construing *Quill* to preclude Colorado from imposing state-tax-collection duties on retailers that lack a "physical presence" in that State, while recognizing "the Colorado consumers' preexisting obligations to pay sales or use taxes whether they purchase goods from a collecting or non-collecting retailer"). Consistent with that understanding, there appears to be no dispute in this case that South Dakota can tax the transactions at issue and can require in-state customers to pay the tax.[2]

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[2] No party disputes that South Dakota's sales tax satisfies the other prongs of the *Complete Auto* framework. Because "the taxable event of the consummated sale of goods" occurs in only one State, sales taxes like those imposed by South Dakota pose no apportionment concern under the second *Complete Auto* prong. *Jefferson Lines*, 514 U.S. at 188. And so long as the State subjects all sales consummated within the State to a uniform tax, regardless of where the goods originate, the tax is not discriminatory under the third prong. See *id.* at 198 (rejecting contention that sales tax was

The *Quill* Court's attempt to harmonize *Bellas Hess* and *Complete Auto* thus was doubly flawed. The four-part test articulated in *Complete Auto* is used to determine whether particular interstate commercial activities can be subjected to state taxation, not whether particular entities can be required to *collect* state taxes. And for purposes of resolving the question that the *Complete Auto* framework is actually designed to address—*i.e.*, whether a State can tax the sale of goods from an out-of-state retailer to an in-state customer—that commercial activity clearly *does* have a "substantial nexus" to the taxing State, even when the retailer's only contacts with that State involve deliveries by mail or common carrier.

2. Senate Bill 106 and similar state tax-collection requirements should be analyzed and sustained under the* Pike *balancing framework

a. Senate Bill 106 and similar laws do not impose a tax liability on the retailer itself. Rather, the tax is imposed on the sale of the goods to the consumer and is owed by the consumer, whether or not the retailer collects the tax at the time of sale. The sales tax itself is clearly valid, and the customers may be legally required

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discriminatory where "all buyers pay tax at the same rate on the value of their purchases"); *D. H. Holmes*, 486 U.S. at 32 (same). The tax also fairly relates to state services under the fourth prong, which requires only a logical relationship between the State's imposition of the tax and its ability to provide benefits and services that the taxpayer enjoys. *Jefferson Lines*, 514 U.S. at 200 (noting that "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax" under *Complete Auto*'s fourth prong); *D. H. Holmes*, 486 U.S. at 32 (finding the fourth prong satisfied where the State provided "services that facilitate [the] sale of merchandise within the State").

to pay it, regardless of the nature and extent of a retailer's other contacts with the State. See pp. 15-16, *supra*. The requirement that the retailer collect and remit the tax does not suggest any doubt as to the customer's independent legal obligation to pay, but simply reflects the "impracticability of [the tax's] collection from the multitude of individual purchasers" after taxable transactions are complete. *National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (*National Geographic*); see *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 343 (1954) ("The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration.").

The validity of that requirement is properly analyzed not under *Complete Auto*, but under dormant Commerce Clause precedents that have addressed the States' imposition of regulatory burdens *other than* taxes. When a State regulates a business engaged in interstate commercial activity, "incidental burdens on interstate commerce may be unavoidable." *City of Phila.* v. *New Jersey*, 437 U.S. 617, 623-624 (1978). Although measures that facially discriminate against interstate commerce are subject to "a virtually *per se* rule of invalidity," *id.* at 624, Senate Bill 106 and similar laws do not discriminate against interstate commerce. Rather, they impose the same obligations on out-of-state sellers that they impose on in-state sellers, without privileging intrastate commerce in any way.

When evaluating facially neutral laws like Senate Bill 106, this Court "has adopted a much more flexible approach." *City of Phila.*, 437 U.S. at 624. Under that

approach, a state regulation that imposes "only incidental" burdens on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. This Court's review under the *Pike* balancing framework is "permissive," *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (opinion of Roberts, C.J.), and "State laws frequently survive" such review, *Davis*, 553 U.S. at 339.

b. Imposing a sales-tax collection obligation on out-of-state sellers provides significant benefits to States. As explained, States require retailers to collect and remit taxes at the time a taxable transaction occurs because requiring consumers to report those transactions and remit those taxes after the fact is likely to be ineffective. In the absence of laws such as Senate Bill 106, a vast amount of commerce could go unreported and untaxed. The U.S. Census Bureau estimates that retail e-commerce sales in the United States in 2017 totaled more than $452 billion, approximately 9% of all retail sales and a 16% increase from 2016.[3] The volume of annual e-commerce sales jumps to more than $6.6 trillion

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[3] U.S. Census Bureau, U.S. Dep't of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales* 2 (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (Quarterly Retail E-Commerce Sales). The Census Bureau defines "e-commerce" as "sales of goods and services where the buyer places an order, or the price and terms of the sale are negotiated over an Internet, mobile device (M-commerce), extranet, Electronic Data Interchange (EDI) network, electronic mail, or other comparable online system." *Ibid.*

when sales by manufacturers, wholesalers, and selected service industries are included.[4]

South Dakota reports that it loses between $21 million and $50 million per year in sales tax revenue due to its inability to require out-of-state retailers who lack a physical presence in the State to collect valid state taxes on those transactions. See Pet. Br. 35. States with larger populations and economies lose even more. See *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring) (noting that Colorado lost an estimated $170 million in 2012). "States' education systems, healthcare services, and infrastructure are weakened as a result." *Ibid.* Those harms are magnified in a State like South Dakota, which has no state income tax and therefore relies on sales and use taxes as a principal source of funding for essential services. S.D. Codified Laws § 10-64-1(2) (Supp. 2017).

Requiring all retailers to collect and remit applicable sales taxes benefits States in other ways as well. A constitutional rule exempting certain out-of-state retailers from applicable state-tax-collection requirements imposes a competitive disadvantage on in-state retailers and encourages the State's citizens to take their business elsewhere. See *Direct Mktg.*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (noting the "startling revenue shortfall [and] concomitant unfairness to local retailers and their customers who do pay taxes at the register"); see also *Quill*, 504 U.S. at 328-329 (White, J., concurring in part and dissenting in part); *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting). It also discourages out-of-

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[4] U.S. Census Bureau, U.S. Dep't of Commerce, *E-Stats 2015: Measuring the Electronic Economy* 1 (May 24, 2017), https://www.census.gov/content/dam/Census/library/publications/2017/econ/e15-estats.pdf (reporting estimates from 2015).

state businesses from acquiring property or employing people in the State, since *any* physical presence—no matter how insignificant and unrelated to the businesses' commercial activities—would subject them to the same tax-collection responsibilities as in-state businesses. See, *e.g.*, *National Geographic*, 430 U.S. at 556 (holding that organization was required to collect state tax on mail-order sales because it maintained two offices in the State, even though they were unrelated to the mail-order business); *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 562 (1975) (same where seller employed a single person who lived in the State and worked from his home); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 208-209, 212 (1960) (same where retailer contracted with ten part-time salesmen in the State).

Under *Quill*, consumers who wish to avoid paying sales and use taxes have an incentive to do business with out-of-state retailers whose business model allows customers to evade the payment of taxes that are lawfully due. Conversely, consumers who are committed to fulfilling their tax obligations have an incentive to eschew such retailers (or at least those who qualify for a *Quill* exemption) in order to avoid the burdens of reporting and remitting their own taxes. Senate Bill 106 and similar laws eliminate those distortions by treating all retailers alike and encouraging competition based on legitimate factors (such as price, quality, selection, convenience, and service) rather than illegitimate ones (such as the opportunity for tax evasion).

c. The burdens imposed on out-of-state retailers by Senate Bill 106 and similar laws do not "clearly" outweigh the legitimate interests of the States in ensuring the uniform collection of valid taxes. *Pike*, 397 U.S. at 142. The *Quill* Court found it "not unlikely that the

mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." 504 U.S. at 316. As explained above, however, sales by out-of-state retailers are not "exempt" from state taxes—the taxes are still lawfully owed by the consumer. *Quill* simply allows certain mail-order retailers to avoid *collecting* the tax, and thus to pursue a business model that makes it easy for customers to evade their tax obligations. But a business "is in no position to found a constitutional right" under the dormant Commerce Clause "on the practical opportunities for tax avoidance which its method of doing business affords [a State's] residents." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941). A state law that prevents a business from capitalizing on its customers' desire to avoid paying taxes they lawfully owe does not "burden" the business, or interstate commerce, at least in any constitutionally relevant sense.

The other burden on interstate commerce cited in *Quill*—the difficulty and expense of complying with a "virtual welter of complicated obligations" imposed by various state and local taxing jurisdictions, 504 U.S. at 313 n.6 (citation omitted)—is manageable. Many States are now parties to a multistate agreement that requires them to implement reforms to "simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." *Streamlined Sales and Use Tax Agreement* Art. I, § 102 (2017);[5] see Pet. Br. 13-14. As South Dakota explains (Br. 14-15, 45-46), moreover, existing software solutions can significantly mitigate the burdens

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[5] Streamlined Sales Tax Governing Bd., Inc., http://www.streamlinedsalestax.org/index.php?page=modules.

associated with collecting and remitting state taxes. Cf. *Bellas Hess*, 386 U.S. at 760 (Fortas, J., dissenting) (noting that claims of excessive burdens associated with tax-collection requirements "vastly underestimate[] the skill of contemporary man and his machines"). And many out-of-state retailers already collect and remit taxes in multiple jurisdictions because they have a physical presence in multiple States or have otherwise agreed to comply with state tax laws. See, *e.g.*, Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNNTech (Mar. 29, 2017).[6] Any assertion that the market would permit significant harm to Internet or mail-order commerce for want of an cost-effective method of complying with state-tax-collection requirements should be viewed with skepticism.[7]

In light of the significant benefits to States of tax-collection laws like Senate Bill 106, and the absence of "clearly excessive" burdens on out-of-state businesses, those laws do not impermissibly burden interstate commerce under the *Pike* balancing framework. 397 U.S. at 142.

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[6] http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

[7] For the reasons stated in the text, the burdens associated with collection of sales and use taxes are not constitutionally excessive, even if out-of-state retailers are required to collect local as well as state taxes. It nevertheless bears noting that respondents' arguments on this score are premised almost entirely on the perceived difficulty of monitoring the tax obligations imposed by a large number of local jurisdictions. If the Court views the burdens associated with collection of local taxes to be constitutionally excessive, that rationale would not extend to laws compelling out-of-state retailers to collect taxes owed to the States themselves.

B. This Court Should Not Extend *Quill*'s Rule To E-Commerce

1. The Court in *Quill* described *Bellas Hess* as "stand[ing] for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause," 504 U.S. at 311, and it declined to disturb that rule, see *id.* at 317-318. See *Bellas Hess*, 386 U.S. at 758 ("[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."). The *Quill* Court also described *Bellas Hess* as establishing a "physical-presence requirement." 504 U.S. at 314, 317. Based on that language, the courts below held that Senate Bill 106 violates the dormant Commerce Clause because retailers subject to the law necessarily lack a "physical presence" in South Dakota. Pet. App. 12a-13a, 16a. Although the State urges this Court to overrule *Quill*, it agrees with the courts below (Br. 7-8, 21) that "physical presence" is required under that decision.

In our view, *Quill*'s precedential effect is less sweeping than the courts below and the parties in this case have supposed. The precise *holding* of *Quill* was that a retailer's shipment of catalogs and goods into the taxing State by mail or common carrier, standing alone, is an insufficient justification for requiring the retailer to collect sales or use taxes from its customers. As we explain below, the Court can retain that holding yet conclude that Internet retailers like respondents, whose websites give them a continuous presence in South Dakota of a

sort that the *Quill* Court could not possibly have anticipated, *do* have a sufficient nexus to the taxing State to justify imposition of tax-collection responsibilities.

It bears emphasis in this regard that, although the *Quill* Court attributed the "physical-presence requirement" to *Bellas Hess*, see *Quill*, 504 U.S. at 314, 317, the Court in *Bellas Hess* itself did not use the term "physical presence" or any variant of it. The Court in *Bellas Hess* did refer to, and rely on, a "sharp distinction * * * between [1] mail order sellers with retail outlets, solicitors, or property within a State, and [2] those who do no more than communicate with customers in the State by mail or common carrier." 386 U.S. at 758. The *Quill* Court's description of *Bellas Hess* as requiring physical presence reflects an apparent assumption, wholly reasonable at the times those cases were decided, that every retailer shipping goods into other States would utilize one of those two business models. On that assumption, *Bellas Hess*'s clear rule that shipments of catalogs and goods into the taxing State could not subject a retailer to tax-collection duties was tantamount to a rule that physical presence was required. The Court simply did not imagine retailers like respondents, who do not have "retail outlets, solicitors, or property within" South Dakota, but whose contacts with South Dakota nevertheless go far beyond "communicat[ing] with customers in the State by mail or common carrier." *Ibid.*

2. E-commerce allows a retailer to "be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Direct Mktg.*, 135 S. Ct. at 1135 (Kennedy, J., concurring). Online retailers frequently engage with consumers in ways that are more like shopping in a physical store than ordering goods from a catalog.

Many retail websites—including those of the respondents in this case—provide virtual showrooms, checkout counters, and even fitting rooms. For example, one of the respondents in this case regularly uses its website to live-stream product demonstrations.[8] The others offer "augmented reality" applications that allow customers "to visualize 3D furniture and [other products] in their home before they buy."[9] Many clothing retailers allow customers to virtually try on clothes by uploading photographs of themselves or by creating digital mannequins that conform to their dimensions. See Fleur Britten, *Brands Embrace An 'Augmented Reality'*, New York Times (Sept. 20, 2011).[10] And websites that do not offer such immersive experiences often contain other features—including 360-degree product views, video demonstrations, personalized shopping lists, real-time customer support, and user reviews—that make

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[8] See, *e.g.*, YouTube, *Newegg Studios Live: The New 18-Core CPU in Action with Intel and ASUS*, https://www.youtube.com/watch?v=eUitlrykACY (recording of live demonstration that originally aired in September 2017).

[9] Wayfair, *Wayfair's AR-Powered Shopping App Now Available to Tens of Millions of Consumers on iOS 11* 1 (Sept. 19, 2017), http://s2.q4cdn.com/848638248/files/doc_news/Wayfairs-AR-Powered-Shopping-App-Now-Available-to-Tens-of-Millions-of-Consumers-on-iOS-11.pdf; see YouTube, *Overstock.com—ios Augmented Reality*, https://www.youtube.com/watch?v=BMtQ-8maWFk.

[10] http://www.nytimes.com/2011/09/21/fashion/fashion-embraces-augmented-reality-technology.html; see also Nathan Olivarez-Giles, *With AR Shopping Apps Like These, You'll Never Leave Home Again; Gap, Amazon, Lowe's And WayfairView Demonstrate The Benefits Of Augmented Reality*, Wall Street Journal (Jan. 13, 2017), https://www.wsj.com/articles/with-ar-shopping-apps-like-these-youll-never-leave-home-again-1484318206.

the experience of online shopping significantly more interactive than a traditional mail-order catalog.

In other important respects as well, e-commerce more closely resembles brick-and-mortar retail than it resembles commerce undertaken through mail-order catalogs. Traditional mail-order commerce is initiated by the merchant, which mails its catalogs to subscribers to advise them of the goods it is offering for sale. Subscribers then mail back order forms indicating which products they would like to buy, and the merchant ships them the goods. See *Bellas Hess*, 386 U.S. at 754-755. Physical stores and retail websites, by contrast, hold themselves out to the public as places (or virtual places) of general accommodation, where customers initiate transactions by visiting the business's storefront or website, and purchases can be made in real time. E-commerce retailers, like brick-and-mortar retailers, also derive significant benefits from the States that go well beyond those necessary to allow delivery of catalogs or goods, including the cooperative efforts of federal and state governments to build a reliable nationwide broadband infrastructure that has expanded access to the Internet.[11]

Because *Quill*'s narrow holding is limited to traditional mail-order retailers "whose *only* contacts with the taxing State are by mail or common carrier," 504 U.S. at 311 (emphasis added), it does not control the question presented here. An online retailer that maintains a continuous virtual presence in South Dakota has a much more substantial nexus to that State than does

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[11] See, *e.g.*, Nat'l Telecomms. & Info. Admin., U.S. Dep't of Commerce, *Continuing The Broadband Dialogue With States* (Apr. 29, 2016), https://www.ntia.doc.gov/blog/2016/continuing-broadband-dialogue-states.

a traditional mail-order business. If the presence of a single salesperson or office in a State is a sufficient nexus even under the rule of *Bellas Hess* and *Quill*, see *National Geographic*, 430 U.S. at 556, the operation of an immersive online marketplace that seeks to replicate the experience of shopping in a store, open for business to every state resident 24 hours a day, should be deemed sufficient as well. The Court therefore can reverse the judgment of the South Dakota Supreme Court in this case, while retaining the rule that shipment of catalogs and goods into a State by mail and common carrier, standing alone, is an insufficient ground for requiring an out-of-state retailer to collect sales taxes owed by its customers.

C. If This Court Construes *Quill* To Hold That Only Retailers With A Physical Presence In The Taxing State Can Be Required To Collect State Sales Taxes From Their Customers, *Quill* Should Be Overruled

The parties have litigated this case, and the courts below decided it, on the premise that *Quill*'s holding affirmatively requires a physical presence in a State as a prerequisite to the imposition of state-tax-collection responsibilities. If this Court agrees with that characterization of *Quill*'s holding, it should overrule that decision, and should hold that the virtual presence within a State of retailers engaged in e-commerce is a sufficient basis for requiring them to collect state sales taxes from their customers.

1. *Quill*'s analysis was conceptually flawed from the outset because the Court purported to apply the *Complete Auto* framework—a four-part test designed to determine whether a State may *tax* particular interstate transactions—to the distinct question of whether the State may compel an out-of-state retailer to *collect* the

tax. See pp. 13-15, *supra*. In the present case, moreover, it appears to be undisputed that, consistent with the dormant Commerce Clause, South Dakota may tax respondents' sales to customers in the State and may require the customers to pay that tax. See pp. 15-16, *supra*. Thus, for purposes of answering the question that the *Complete Auto* framework is actually intended to address, respondents' sales to South Dakota customers *do* have the "substantial nexus with the taxing State," 430 U.S. at 279, that *Complete Auto* requires.

As we explain above (see pp. 17-23, *supra*), imposing state-tax-collection duties on out-of-state mail-order and Internet retailers is likewise consistent with the *Pike* balancing framework that governs dormant Commerce Clause analysis of state regulations other than the imposition of taxes. *Quill*'s practical effect is to treat requirements that out-of-state retailers collect state taxes as essentially sui generis, by subjecting them to more demanding dormant Commerce Clause scrutiny than is applied *either* to non-tax regulatory obligations *or* to the actual imposition of state taxes. Cf. *Direct Mktg.*, 814 F.3d at 1149 (Gorsuch, J., concurring) (noting that, even in situations where *Quill* bars States from requiring out-of-state retailers to collect sales and use taxes owed by their customers, States may impose "various notice and reporting obligations" that are "comparable in their severity to [the burdens] associated with collecting the underlying taxes themselves"). The Court in *Quill* identified no plausible rationale for such an approach.

If *Quill* is read to hold that only businesses with a "physical presence" in the taxing State can be required to collect state sales taxes from their customers, its application to Internet retailers will produce particularly

perverse and arbitrary results. Under that approach, a mail-order company that sells $10,000 worth of goods to 300 state residents in a year, and that employs a single employee within the State who works out of his home on matters that are unrelated to those sales, could be required to collect and remit state sales taxes under the logic of decisions like *National Geographic* and *Standard Pressed Steel*, *supra*. The State could not impose the same tax-collection duty, however, on an e-commerce retailer that makes $1 billion in annual sales to ten million state residents, using a website that replicates the immersive experience of being in a physical store, if that retailer has no employees or tangible property within the State. Although the second company's customers could still be required to pay sales taxes on their purchases, the State would lack any effective means of enforcing that obligation. No sound reason exists to retain such an illogical distinction.

2. Stare decisis "is not an inexorable command," and "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991) (citing *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940)). *Quill* is badly reasoned. If *Quill* is read to hold only that shipments of catalogs and goods into the taxing State are insufficient by themselves to support the imposition of state-tax-collection duties, its continuing practical effects are likely to be modest. But if the decision is understood to hold that "physical presence" is required, a reaffirmation of *Quill* would substantially impede state tax collection and would distort retailers' choices of appropriate business models. Those problems are likely to become more severe as e-commerce

expands.[12] Those practical concerns, combined with *Quill*'s serious analytic flaws, would amply justify overruling that decision.

This Court's dormant Commerce Clause jurisprudence has been "fluid," *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 851 (1996), and changes in "the national economy" have often led to "a natural development" in that jurisprudence, *Camps Newfound/Owatonna*, 520 U.S. at 577 n.10. Sensitivity to such developments is consistent with the Court's practical approach that takes account of "economic realities." *Complete Auto*, 430 U.S. at 279; cf. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (noting that, in construing the Sherman Act, stare decisis is "not as significant" because common-law rules adopted to implement the statute's general language may "evolve to meet the dynamics of present economic conditions"). Even if *Quill*'s reference to a "physical-presence requirement" is understood to be a holding of the case, the *Quill* Court clearly did not and could not anticipate the manner in which Internet commerce has developed, and the consequent potential for Internet retailers to maintain a pervasive presence within a State despite their lack of employees or tangible property there.

If *Quill* is read to preclude a State from imposing tax-collection duties on an out-of-state retailer who

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[12] See, *e.g.*, *Quarterly Retail E-Commerce Sales* 2 (noting that e-commerce grew by about 16% in the United States from 2016 to 2017); U.S. Census Bureau, U.S. Dep't of Commerce, *Estimated Annual U.S. Retail Trade Sales—Total and E-Commerce: 1998-2015*, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls (tracing growth of e-commerce sales, from about $5 billion in 1998 to over $340 billion in 2015).

lacks a "physical presence" in the State, that decision should be overruled. The Court could still choose, however, to leave intact *Bellas Hess*'s more limited holding that such duties cannot be premised solely on a traditional mail-order retailer's dispatch of catalogs and goods into the taxing State. That approach would largely avoid the practical problems that a "physical presence" rule would cause, while respecting the reliance interests of the (presumably rare) retailers who have remained within the "safe harbor" that *Bellas Hess* established "for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'" *Quill*, 504 U.S. at 315 (quoting *Bellas Hess*, 386 U.S. at 758).

D. Congress's Authority To Legislate In This Area Should Not Dissuade The Court From Limiting Or Overruling *Quill*

The dormant Commerce Clause constrains State efforts to regulate interstate commerce only "when Congress has not acted." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). As in *Quill*, the "underlying issue" in this case therefore is "one that Congress has the ultimate power to resolve," 504 U.S. at 318, and Congress may do so regardless of the Court's decision in this case.

Congress's ability to exercise that authority will be enhanced, however, if this Court clarifies the limited nature of *Quill*'s holding. As the course of this litigation illustrates, *Quill* has been widely understood to establish a "physical presence" rule under which an e-commerce retailer's pervasive Internet presence in a State is an insufficient ground for imposition of state-tax-collection duties. If (as we argue above) *Quill*'s actual holding is more limited, this Court's clarification of that fact will

serve a valuable function, both by assisting the States in the administration of their tax laws and by informing Congress of the applicable default rule as it considers these issues further.

If the Court views *Quill*'s reference to a "physical-presence requirement" as a holding of the case, that holding should be overruled. To be sure, this Court is particularly reluctant to overrule precedents that Congress has power to overturn. But the nature of an Internet retailer's presence in the States where its website is accessible is different in kind from any type of "presence" that the Court could have anticipated when *Quill* was decided. Whether *Quill*'s reference to physical presence is viewed as dictum or a holding, it obviously was not written with modern e-commerce in mind. Rather than treating itself as inexorably bound by a decision that resolved that issue only serendipitously, if it resolved the issue at all, the Court should hold that a retailer's Internet presence in South Dakota provides a sufficient basis for requiring it to collect state sales taxes from its customers.

CONCLUSION

The judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted.

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